

Legal Capacity of Muslim Woman Regarding Marriage in Islamic Law

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Abstract

Muslim man and woman are given complete legal capacity under Islamic law provided that they are sane, have attained their puberty and are prudent. Marriage is a legal contract which possesses high significance and sacredness in Islamic law. Muslim jurists, therefore, provide certain principles and conditions to secure it from defective decisions. Guardianship, in Shari'ah, is the right of a person, who is capable enough for protection the rights and interests of a person who is unable of doing it autonomously due to no or limited legal capacity. According to Hanafi School of law, a mature free Muslim woman has complete legal capacity to enter in to the marriage contract. Guardian's absence in her marriage does not make the marriage contract invalid provided it fulfills other conditions. The principal aim of this paper is to examine legal capacity and guardianship in marriage and to investigate the extent of the guardian's authority to conclude a marriage in the case where he has the right of compulsion and in the case where he does not have it. The paper also emphasizes the significance of presence of guardian for protection of woman's welfare and that it should not restrict woman's legal capacity in marriage.

Key words: Legal Capacity, Hanafi School of Law, Muslim Woman, Marriage Contract

Introduction :

The exclusiveness of the Muslim marriage rules has made it an interesting topic for discussion among legal authorities and jurists. A Muslim marriage (*nikkah*) has its rules which had been laid down by the Qur'an and traditions of the Prophet peace be upon him. Marriage contract is considered as an sacred and significant unification between a Muslim man and Muslim woman. The Qur'an discusses the bond of marriage as follows:

"Among His signs is that He created for you spouses from yourselves so that you might find repose with them. And He has placed between you affection and mercy. In that there are certainly signs for people who reflect."¹

The Qur'an explains it in 4:21 and proclaims marriage as a solemn covenant (*mithq-i-ghaliza*)²

The Messenger of Allah peace be upon him said that "marriage fulfills half of one's religious obligations". It is reported that the Messenger of Allah peace be upon him said:

"Whoever Allah provides with a righteous wife, then Allah has assisted him in half of his religion. Let him fear Allah regarding the second half."³

Muslim jurists (*fuqaha*) have discussed it as a religious duty and are therefore considered it as a source of safeguard of morality and necessity for social wellbeing. Due to its significance, marriage should be observed but like other religious duties performed in Shari'ah, it is not exercised by those who are apprehensive about fulfilling its responsibilities. Principal and important view adopted by the Scholars and Muslim jurists are that marriage due to its

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significant social requisite, it is not enormously obligatory for every person. Therefore, they have classified individuals with regard to their marriage legal ability from Shari'ah perspective.

'Abdur Rahim in Muhammadan Jurisprudence writes:

"The Muhammadan jurists regard the institution of marriage as combination of both i.e. the nature of *'ibadaat* (devotional act) and *Mu'amalat* (dealings) among men".⁴

Legal capacity of spouses in marriage contract in Shari'ah

In Islamic Law, man or woman, is a subject of *the* Shari'ah i.e. (*mukallaf*) under legal obligation. Every living human being is therefore, *mukallaf* regardless of sex, colour, creed, age or mental and physical ability or disability⁵. For fulfilling conditions of the complete legal capacity one must be sane (*'aqil*), should have attained puberty (*baligh*), and must have prudence (*rushd*)⁶.

Legal capacity (*ahliyyah*) is in essence the condition of a person to enter into commandment of Shari'ah, that is, to observe rights and responsibilities. According to jurists, marriage contract is similar to other financial contracts due to certain commonalities, mentioned as:

1. the prerequisites of offer and acceptance,
2. the two contracting parties,
3. Just witnesses, and
4. rulings related to contractual conditions⁷.

According to the general rules of contract in Islamic law, the consent of both parties is a precondition without which the contract is null and void.⁸

Guardianship- meaning and significance in marriage:

Guardianship is discussed by the Jurists as follows :

"It is the legal authority invested in a person fully qualified and competent to safeguard the interest and rights of another who is incapable of doing so independently, that is someone who has limited or no legal capacity. It is authority of a father or near male relative over minor, insane or inexperienced persons who need protection of interests and guardianship"⁹.

Wilayah (guardianship) in marriage is a kind of protection instituted by Islamic law to secure the interest of a woman's rights at the time of her marriage contract. Islamic law established the principles of guardianship on the basis of compassion, support, and assistance to women.

There are two opinions about marriage of a minor:

First: the opinion of two prominent jurists Abu Bakral-Aamm and Ibn Shubrumah who say that child marriage is not allowed by Shari'ah¹⁰. The bases of their views are taken from the Quran:

"And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them. And do not consume it excessively and quickly, [anticipating] that they will grow up. And whoever, [when acting as guardian], is self-sufficient should refrain [from taking a fee]; and whoever is poor let him take according

to what is acceptable. Then when you release their property to them, bring witnesses upon them. And sufficient is Allah as accountant”¹¹.

Second view is of Hanafi, Shafi'i, Maliki and Hanbali jurists on this issue that marriage of minor is lawful provided it is constructed by marriage guardian¹².

“The most important difference between male and female children with respect to freedom to marry was a consequence of the rules of emancipation. Whereas a male child was automatically emancipated from his father's jurisdiction upon reaching biological and social maturity, a female was not emancipated from her father's jurisdiction until two additional requirements were satisfied i.e. entry into her marital home and the testimony of reliable witnesses that she could successfully manage her property”¹³.

The marriage guardian, mostly the father¹⁴, in exercising of guardianship (*wilayah*) has authorized to contract his minor ward in marriage. It shows with the meaning that the girl's consent is not required and it is recommended to take her agreement.

Imam Abu Hanifah defines that:

“the guardian has full authority to marry his minor girl whether she is a virgin or previously married. Hanafi School of law however, allows an incumbent at the age of puberty to repudiate a marriage contracted before puberty by guardians other than the father or grandfather. Furthermore, this school of law allows a mature woman to choose her husband and conclude the marriage contract herself”¹⁵.

The other schools of Islamic law¹⁶ conclude that the authority to guardianship towards minors in marriage resides with the father only and in some situations where father is not available grandfather is appointed as agent. In case of absence of these guardians, other guardians have to wait until the woman give consent after attainment of puberty. For fulfillment of the agreement (*ijab and qubul*) in the marriage contract by the two parties, it involves a bridegroom or his agent and the bride's guardian, who is authorized to conclude the contract on her behalf to protect her interests after taking her consent.

Legal Capacity of Woman and marriage consent:

In Muslim law the consent is essential element in marriage negotiations because marriage under Islam is a contract. A Muslim marriage is contracted by means of announcement and permission, both to be articulated in the priorities. The marriage contract in its spirit is approval on the part of Muslim male and female to cohabit with each other only. A marriage contract is valid and binds on Muslim man and woman when they possess the capacity to enter into the contract by mutual consent. Both parties must understand the nature of the marriage contract and there must be mutual consent otherwise without these elements no contract of marriage can be valid, so free consent in case of adult person, is not only essential for ⁵ valid marriage but is absolutely necessary.

Some of the contemporary jurists, such as Sa'id Mustafa, says that:

“...unjustified prevention of marriage is a failing in duty rather than an abuse of right i.e. guardianship is intended to be in the interest of the person to whom it applies. The estimation of this benefit is left to the guardian according to what he sees as the fitness or otherwise of the suitor. He has the

right not to give in marriage the person under his guardianship to someone who is not her equal and the right to object to a marriage and demand separation. The right of the guardian, like any other right, is restricted by the requirement that it be used for the purpose for which it exists".¹⁷

Views of Jurist regarding Legal capacity of Muslim woman in marriage:

The marriage contract is not exception, however due to its sacred character Muslim jurists have tried to provide certain precautions so that marriage institute is secured from defective decisions.

1) Views of Jurists of Maliki and Shafi'i Schools of thought:

According to Maliki' and Shafi' schools, due to the significance of the agreement, the permission of an virgin adult Muslim woman is indispensable for legality of the marriage contract but she cannot enter into it on her own behalf without the Guardian (*wali*)¹⁸. The consent of an adult virgin is not sufficient for the completion of the marriage contract; it must be given through the guardian. Thus, as per Maliki' and Shafi'i schools, a woman cannot be autonomous authority to the marriage contract. The guardian's will and agreement is a pre-requirement of contract by the Shafi'i and Maliki schools to complement the consent of the woman, to comprehend the nature of the contract, to straighten out the terms, and to guard the woman from a deceitful contract, or from marry a man who is not suitable for her status.¹⁹

"A mature married or unmarried woman who attained puberty and the quality of prudence may dispose of her properties with or without consideration of guardian".

This is the opinion of Shafi'i's, Hanafi's and of Ibn Hanbal, prevalent in Hanbali teachings.²⁰ It however is not the case in Maliki School of law. According to it, an unmarried woman has restricted legal capacity until she marries. The basis of this opinion is that her father may always conclude her marriage without her permission and that restrict her full capacity. Even after her marriage a woman, by the jurists of Maliki school of law, still as partially detracted from full capacity due to the acts she performs without consideration, such as issuing guarantees or making gifts are not allowed without the husbands authorization. Somehow, acts of disposition with proper consideration such as selling, buying or letting are allowed with no need for husband's authorization²¹.

2) Views of Hanafi School of Law on Legal capacity of woman:

"According to the authoritative opinion of Abu Hanifah and Abu Yusuf a marriage of a mature woman is concluded without the consent and presence of a matrimonial guardian. This is because she disposes of something which she is exclusively entitled by being sound of mind and age. For this reason she is entitled to dispose of her property. The principle here is that whoever may dispose of his property by his own right may conclude his own marriage"

Imam Abu Hanifa maintained that it is not obligatory for a sane, adult woman to have a guardian. Based on this argument that she is entitled to conduct her own marriage contract whether she was previously married or a virgin and restricted the *wilayah* exclusively to prepubescent females. On the other hand, he maintained that it is a delegation, not

guardianship, for the sane, adult female, therefore a mature woman can conclude her marriage without presence and permission of guardian.

The School of law agreed that the father or the grandfather can contract the marriage of the mature woman with the consent however, the Muslim jurists differ on the authority of guardian whether its delegation or binding and on its result the legal status of marriage contracted.

Muslim Jurists differentiate between two situations:

First, there is no disagreement between the jurists in principle regarding the fact that woman who has previously marriage experience, i.e. (*thaiyyab*) who can choose their new husbands. However they disagree on whether the woman can conclude her marriage by own single will or must her consent be combined with that of her male guardians²².

Among Hanafi School of law a Muslim woman who is mature and sane and contract her financial contract, her capacity is absolute in marriage contract and guardians consent cannot substitute for woman consent. Although, the consent of adult virgin woman is essential same as in Hanafi law, but in Shafi'i's and Maliki's Law the woman cannot contract herself in marriage without the permission of her guardian. therefore, in Shafi's and Maliki's schools the consent of mature and virgin woman is not sufficient for the conclusion of the marriage bond. It must be through the legal guardian. The consent may be given either in express terms or by amplification. In the case of a woman who has previously married widow or divorced, to comprehend the marriage contract and its nature, her consent is required to be expressive. In the case of virgin woman, the jurists of all schools hold the similar view that smiling or remaining silent may be construed to imply consent.

The Prophet (SAW) has said, "a virgin must be consulted in everything regarding herself, and if she is silent, it signifies consent". Ayesha narrated: I said "Oh Allah's messenger, a woman feels shy to give consent in marriage, he said, her consent is expressed by her silence"²³.

According to the views of the Hanafi jurists, consent of the guardian is not prerequisite for marriage of adult Muslim woman. Adult woman has full legal capacity like Muslim man, she may chose her prospective husband and give consent without duress on her by her relatives.

Therefore, Hanafi jurists emphasize the authority of guardian that guardian has the right to object on the woman's choice and *nikkah* would be *fasik* by the court if the prospective husband is not fulfilling the requirements of suitability (*kufu*) socially or morally.

Imam Yusuf and Imam Muhammad both have the view that:

"any woman who wants to enter her marriage contract, if the partner is according to her status then marriage of both will be done. Only the guardian has the right to raise objection if the husband was not according to her status. If both were agreed and they had the same status then the right of guardian will abrogate"²⁴

Al-Mawwaqat quotes the Andalusian jurist, Ibn Lubb, as saying that "the requirement of a guardian is only to assure that the (requirement of) *kafa'ah* is met, (which is accomplished) by means of the guardian's judgment".

Basis of Requirement of Kufu:

According to the Hanafi School of Law, the guardian may object her choice of prospective husband if he does not fulfill the requirements of *Kufu* i.e.

1. the he has not good morals,
2. or she has not given appropriate dower
3. or it become evident that her prospective husband will deceit her in regard to her financial position²⁵.

The woman must specify the dower in marriage contract appropriate to the brides of her family and status. Imam Abu Hanifa declares that:

"If she selects a suitable match and does not settle for a reduced dower, then the marriage³ is valid and allowed."²⁶

Adult Woman's consent is vital for the legality of marriage consent. Imam Abu Hanifah ruled that :

"If the woman contracts herself in marriage without a guardian and the groom is of equal social standing (*Kufu*), the contract is permissible"²⁷.

Evidences by the jurists of Hanafi School of Law:

The complete legal capacity is possessed by the adult sane Muslim woman and therefore Jurists of Hanafi school of law give the validity to woman to contract her marriage contract on the basis of following¹ evidences with their implications:

1. Allah swt address in the Qur'an:

"When you divorce women, and they fulfil the term of their waiting period (*'iddah*), do not prevent them from marrying their (former) husbands, if they mutually² agree on equitable terms."²⁸

In this verse, guardians are instructed not to obstruct by preventing woman from marrying her former husband³ Moreover, it is indicating that the woman can conduct their marriages and they are capable to marry themselves without the permission and consent of their guardian.

2. At another place the Qur'an says:

"If any of you dies and leaves widows behind, they shall wait concerning themselves four months and ten days: When they have fulfilled their term (of *'iddah*), there is no blame on you if they dispose of themselves (marry themselves off) in a just and reasonable manner."²⁹

In the above *ayah*, there is clear injunction that woman has full legal capacity of marrying themselves and there is no requirement of the approval of their guardian.

3. 'Abdullah b. 'Abbas narrates that the Prophet (peace be upon him) said:

"*Ayyim* woman has more rights in managing her own affairs (i.e. marriage etc.) than her guardian, and a virgin's consent must be sought concerning herself, and her silence implies² her consent."³⁰

In this tradition of the prophet, the term *ayyim* means a woman who has no husband (*man lazawjalaha*) which includes virgin and non-virgin² women both. The tradition is clearly stating that the woman has more right of consent than her guardian in her own affairs in terms of marriage.

"'Ali b. Abi talib (Allah be pleased with him) would strongly advise against marrying without the guardian's approval, but if someone was to go ahead and marry, he would consider their marriage to be valid"³¹.

4. The hadith mentioned in Shaiḥ Bukhari and Muslim discussing marriage without the guardian's approval is completely invalid: "There is no marriage without the (permission of a) guardian"³²

And "Any woman who marries without the permission of her guardian, her marriage is invalid, invalid, invalid"³³,

Explaining the understanding of the hadith, Maulana Zafar Ahmad Uthmani states in his encyclopedic work, *I'la al-Sunan*, that:

"...hadith mentioned above such as her marriage is invalid, in some situations and that situation is when she marries herself off to a person who is not considered a legal match to her. These are to be understood in light of the other a hadith that point to the validity of such a marriage. As such, the generality in these two hadith is restricted to pubescent (*non-balighah*) and slave women, whilst adult and free women are to be excluded from this general ruling due to the evidences favouring the validity of their marriages without the guardian's approval. There is no complete and blessed marriage without the permission of the guardian but the marriage in of itself is valid provided the woman marries a person who is a legal match to her".

5. The reporters of the ahadith, Sayyida Ayesha and Imam Shahab az-Zuhri (Allah be pleased with them) both have opposed the commandments given in the traditions.

"Sayyida Ayesha (Allah be pleased with her) married off Hafsa bint Abdurrahman without the approval of her guardian". Imam Zuhri is reported to have said:

"Any woman who marries herself without her guardian's approval, her marriage is valid".

It is a basic rule in hadith literature that when the reliable narrator contradicts with what is reported, then reporters' actions will be taken as tool to understand the commandments rather words with literal meanings.³⁴

6. From a point of view of transmittal (*isnad*) both the ahadith have certain deficiencies. Therefore above explanation conclude that if a woman marries a person who is not considered a legal equivalent *kufu* to her, and she marries without the consent of her guardian, then the marriage contract will be void.

Marriage without the guardian's approval is valid:

It is the guardian's authority to marry her ward to a legal suitable status and the right of the woman establishes to take her consent for marriage. This principle is apply on all forms of women, mature virgin, widow and divorced.

Shaykh Muhammad Qudri writes:

"...It is the right of a free and legally responsible woman to marry herself without the approval of her guardian, whether she is a virgin or non-virgin. This marriage will stand as valid if the husband whom she married is a legal match to her...and if she (free and legally responsible woman, whether virgin or non-virgin) married herself off to someone who is not a legal match to her without the explicit approval of her guardian before the marriage contract, then her marriage would be invalid altogether, and the permission given by

the guardian later on will be of no consequence (meaning a new marriage contract will have to be performed should the guardian agree later on).³⁵

For the Hanafi jurists, the woman on reaching the age of puberty can terminate the marriage contract which was constructed by her guardian in minor, she exercise her option of puberty called (*khiyr al-bulugh*).

Guardian is authorize to settle the terms of the marriage contract:

Hanafi School of law has the view that an adult woman has full legal capacity to give her consent without coherence of Guardian. The Hanafi School of law renders complete consent to woman on her attainment of legal majority.

“when a girl is adult and discreet, no one has a right to be her guardian, but it is nevertheless becoming and proper for her to authorize her father or grandfather to settle the terms of the contract for her. If she has no father or grandfather, it would be well for her to appoint her brother to act on her behalf”.³⁶

Zafar Ahmad Uthmani states:

“We (also) hold the position that a marriage without the approval of the guardian is invalid in some situations, even if the woman is an adult (*balighah*) or non-virgin/widow (*thayyibah*), such as when she marries herself off to someone who is not her legal match and her guardian does not approve of it”.³⁷

The above mention argument clearly shows that the guardian in marriage has the authority to safeguard the interest of the ward in respect to the same match of the groom for the bride.

Conclusion:

Shari'ah provides complete legal capacity to women regarding marital issues. According to the juristic opinion by Hanafi School of law a minor girl (i.e. who has not passed the age of puberty) cannot conduct her marriage contract due to restricted legal capacity and weakness in her understanding which may not be sufficient for her to make a decisive decision. Muslim woman has the option of puberty to exercise. Muslim Jurists have consensus on the opinion that mature Muslim woman, who is a divorcee or a widow, has full legal capacity to conclude her marriage on her own accord and desire. This is due to the fact that she has experienced marriage and its associated occurrences therefore Shari'ah allows mature woman to have complete legal capacity. The main disagreement amongst the jurists of different schools of law is regarding the issue of a mature woman who is of sound understanding and intellect, and attains age of puberty and never has been married previously. According to Jurists of Hanafi school of law, if a mature woman conducts her marriage without the permission of her guardian to a man who is compatible in legal and social status with her, then she has the complete legal capacity to do so. However including her marriage contract with the permission of her guardian by a Muslim woman is the most preferred and an ideal manner because of modesty.

Endnotes:

¹ Al-Quran 30:21

² Al-Quran 4:21

³ *al-Mu'jam al-Awsat* □ hadith no.992

⁴ Abdur Rahim. *The Principles of Mohammedan Jurisprudence* (Lahore, 1958) p. 227

⁵ Kamali, *Principles of Islamic Jurisprudence* .pp. 236-237

⁶ Syed Amir 'Ali. *Mohammaden Law*. Vol: 2. P 275

- ⁷Kisani Alauddin, Bidaya Sinai'. (Cairo: Sharakat al-Matbuat al-Islamiyyah) Vol: 2 p 229
- ⁸Al-Zarqa. *Al-Madkhal al-fiqhi Al-am*, (1959) vol. 2, p. 295
- ⁹Abd al-Ati. *The Family Structure in Islam*, p. 70
- ¹⁰Sarakhsi, *al-Mabsut*. Vol4, p. 193
- ¹¹Al-Quran 4:6
- ¹²Kisani Alauddin, Bidaya Sinai'. Vol 2 p 241
- ¹³Al- Marghīnānī, *Al-Hidaya -the Guidance*, vol. 1, *Kitāb al-Nikāh*, 491
- ¹⁴Hanafi school of law includes a broader range of family guardians in the absence of the closer ones. Her guardian is understood to be the father, if the father is not alive, then the grandfather, then the blood brother, the uncle (father's brother), then cousin (father's brother's son), then the mother.
- ¹⁵Siddique, Muhammad Iqbal. *The Family Law of Islam*. (Virginia: Kazi Publications, 1984) p 115
- ¹⁶Sunni School of law including Shafi, Hanbali and Maliki. Al-Jaziri, Abd al-Rahman, *Kitab al-Fiqh ala al-Madhahib al-Arba'a*, vol.4, pp.21, 22.
- ¹⁷Al-Said, Al-Said Zustafa, *Fi Madalsti'malHuqzwq al-Zawjiyyahwa ma Tataqayyadbihi fi al-Shari 'ah al-Islamiyyahwa al-Qanun al-Misri al-Hadith*, pp.172-175.
- ¹⁸Kasani, Alauddin, *Badai al-Sanai*. Vol 2. p 229
- ¹⁹ibid p. 241
- ²⁰Ibn Qudama, *al-Mughni*, Beirut: (Dar al-Fikr 1985)vol 4, p .512-514,
- ²¹Ibid. Ibn Qudama, , p.512-514
- ²²Imam Sarkhasi. *Al-mabsut*. p 157
- ²³Siddiqi, Hamid Abdul, Sahil, *Sahih Muslim*, Vol. 11, p. 715.
- ²⁴Anwar Muhammad Noor. *3 kkah may walikihasiyat*. (Lahore: Wahdat Foundation 1999) p 155
- ²⁵Ahmad, Naseem. *Woman in Islam*. (New Dehli: APH Publishing corporation, 2003) p 562
- ²⁶ibid p. 563
- ²⁷Masud Muhammad. *Islamic Laws and Women*. (Islamabad: Giant Forum 1996)p 56
- ²⁸Al-Quran 2: 232
- ²⁹Al-Quran 2: 234
- ³⁰Sahih Muslim, no: 4121, Abu Dawud, no. 2085 and At-Tirmithi no. 1101
- ³¹Kanz al-'Ummal, no: 4575
- ³²related hakim and Abu Dawud
- ³³related by Ibn Hibban, Tirmidhi and others, and Tirmidhi considered it to be Hasan
- ³⁴Zafar Ahmad Uthmani. *I'tḥ al-Sunan*. Vol 1, p. 66-68.
- ³⁵Shaykh Muhammad QudriBasha. *al-Ahkam al-Shar'iyyah fi al-Amwal al-Shakhriyyah*. P 31-32
- ³⁶Khan Tauqir. M. *Law of Marriage and Divorce in Islam*. New Delhi: Pentagon Press. p 27
- ³⁷Zafar Ahmad Uthmani. *I'tḥ al-Sunan*, Vol 1, p. 69

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